State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Winchester Teachers Association, NEA-New Hampshire Petitioner v. Winchester School Board Respondent	Case No. T-0317-6 Decision No. 2001-095 (Modification Petition)

APPEARANCES

Representing Winchester Teachers Association:

Mary E. Gaul, UniServ Director

Representing Winchester School Board:

Margaret-Ann Moran, Esq.

Also appearing:

Colleen Duquette, Winchester School Board
Douglas Hatfield, Winchester School Board
Ellen Mendelson, Winchester Elementary
Julia W. Gresser, Winchester Elementary
David Funkhouser, Winchester Elementary
Donna Robinson, Thayer High School
Lisa Johnson, Thayer High School
Rick Durkee, Thayer High School
Amy Adams, Thayer High School

BACKGROUND

The Winchester Teachers Association, NEA-New Hampshire (Association) filed a Modification Petition on March 27, 2001 which sought to include the positions of school nurse, professional guidance counselor and social worker in an existing bargaining unit consisting of teachers, non-supervisory principals and librarians.[1] The Winchester School District (District), acting on behalf of the Winchester School Board, filed its answer, inclusive of objections to the petition, on April 11, 2001. The parties participated in a pre-hearing conference on May 14, 2001, the results of which are memorialized in a Pre-Hearing Memorandum and Order denominated Decision No. 2001-035 and dated May 15, 2001. That order noted, as is reiterated here, that the District asserted procedurally that the Association is barred from pursuing the instant petition under the provisions of Rule PUB 302.05 (b) or, in the alternative, because the three (3) positions in the petition lack a community of interest, lack the requisite instructional responsibilities, lack similarity in salary and benefit structures and, in the case of the guidance counselor, exercise supervisory functions over members of the existing bargaining unit. The pre-hearing order set June 12, 2001 as the hearing date for this case.

By filing of May 24, 2001, the District submitted a Consented Motion to Continue to move the hearing date to June 21, 2001 which was granted. (Decision No. 2001-042.) In the meantime, on June 6, 2001, the District filed a more articulated Motion to Dismiss, accompanied by a memorandum of law in support of that motion. On June 18, 2001, the District's counsel filed another motion to continue what was then the June 21, 2001 hearing for purposes of funeral leave. Subsequently, by letter of June 26, 2001 but filed on June 28, 2001, the Association filed a motion to continue, stating witness and scheduling problems and requesting that this matter be scheduled in late August or early September. The PELRB accommodated by rescheduling this matter for August 29, 2001, a date which did not materialize, but, with the agreement of the parties, was moved to September 6, 2001 when the PELRB did hear this case. At the conclusion of the hearing, the parties were asked to submit post-hearing briefs on or before September 20, 2001. Both briefs were received on that date in a timely fashion.

FINDINGS OF FACT

1. The Winchester School District, by and on behalf of the Winchester School Board, operates a school system in Winchester, New Hampshire,

[1]According to correspondence from Douglas Hatfield, Esq. to Mary Gaul, dated May 21, 2001 and filed with PELRB on May 25, 2001, Title 1 teachers are considered to be "teachers" within the definition of the CBA. Subsequent correspondence between the parties (Hatfield to Gaul, June 7th; Gaul to Hatfield, June 14th; Association's proffered amendment of August 28, 2001, and the District's letter of September 4, 2001 objecting thereto) indicates a dispute having arisen after the filing of the petition, and seemingly at or after the pre-hearing conference, about a position held by Lisa Johnson. The Association has asserted that Ms. Johnson is a Title 1 teacher (thus covered by Mr. Hatfield's letter of May 21, 2001) while the District contends that Ms. Johnson is a "Title 1 Coordinator" or "Title 1 administrator" and is to be distinguished from a "Title 1 teacher." Because of the nature and timing of the raising of this issue, we GRANT the District's motion objecting to this amendment to the pending petition; however, we take this action "without prejudice" so that the parties, or either of them, may raise the nuances of this Title 1 position in a separate unit modification proceeding in asmuch as there is no evidence that there was either prior discussion or prior negotiation about Ms. Johnson's position during the course of bargaining or that this issue was even contemplated when the petition was filed.

and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Winchester Teachers Association, NEA-New Hampshire is the duly certified bargaining agent for "all full-time teachers, assistant principals, librarians, and any new employees who instruct or teach at least three-fifths of the school day and whose position is not administrative." See certification in Case No. T-0317 dated October 3, 1979 and Article 1.1 of parties' 1998-2001 CBA, also identified as District Exhibit No. 5.

3. The provisions of Rule PUB 302.05 (b)(2) provide, in pertinent part:

> "A [modification] petition shall be denied if...the petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed actually changed prior to negotiations on the collective bargaining agreement presently in force."

The District has asserted that such "negotiations" did occur as evidenced by the Association's proposal of June 14, 2000 to add, only "nurses" to the bargaining unit (Assn. Exhibit No. 1) followed by its proposal of September 12, 2000 to add nurses, guidance counselors and social workers to the bargaining unit (District Exhibit No. 2), the Association's reiteration of the same language in its proposal of October 12, 2000 (District Exhibit No. 3) and the District's rejection of the Association's October 12, 2000 proposal (District Exhibit No. 4). Thus, the District further asserts the pending petition is barred by PUB 302.05 (b).

4. According to testimony presented by District negotiator/Attorney Douglas Hatfield, the issue of adding only the nurse to the bargaining unit was raised as early as June 14, 2000. This produced information that guidance counselor and social workers are not currently in the bargaining unit whereupon these positions were added to the Association's subsequent proposals. Hatfield affirmed that the issue of changing the contract's recognition clause, Article 1, remained on the table "almost to the very end" and that this topic was discussed in mediation. These negotiations, which started in the summer of 2000, continued until terms for a 2001-2004 CBA were agreed upon in late December, 2000. It was not until a financial package was agreed upon that the parties reached settlement, a settlement which occurred as they were waiting to proceed to fact finding.

5. When the parties did reach settlement as the result of a mutually satisfactory package of financial incentives, they memorialized their agreement in the form of a contractual extract which annotated those terms or provisions to be changed from the former CBA. Both

sides, through their negotiations representatives, signed this document (District Exhibit No. 1). The document reflects no change in the composition of the bargaining unit from the manner in which it was described in the 1998-2001 agreement.

6. The Association claims the provisions of PUB 302.05 (b) do not apply because (1) they announced they would raise this matter with the PELRB if the parties were unable to settle it themselves through negotiations, (2) they received no *qui pro quo* for having withdrawn the issue of unit composition when settlement was reached in December of 2000, and (3) because the PUB 302.05 bar, if it were to apply, would only apply to the "bargaining agreement presently in force," which, to them, meant the 1998-2001 agreement.

7. There is no evidence of a waiver or "agreement to disagree" on the issue of modifying the bargaining unit. There is no evidence of an agreement or promise not to raise Rule PUB 302.05 defenses to a modification petition to be filed after bargaining failed to change the composition of the bargaining unit.

DECISION AND ORDER

The purposes behind Rule PUB 302.05 (b) (2) are clear and uncontroverted. They are intended to facilitate the parties' mutual agreements, if any, to modify the composition of a bargaining unit so that its declared *and recognized*[2] structure is consistent with changes made in the organization and operation of the public employer under RSA 273-A:1 XI. Notwithstanding the desirability of accomplishing and memorializing changes in bargaining unit composition resulting from changes in organizational structure, there are constraints on this process, as imposed by administrative rule.

The pertinent provisions of Rule PUB 302.05 (b) (2) are found at Finding No. 4, above. Rule PUB 302.05 generally recites the circumstances under which the public employer or the certified bargaining agent may file to modify the composition of a bargaining unit. While restricted primarily to the public employer or the certified bargaining agent, these parties have broad latitude to make such a filing, in the form of a modification petition. Conversely, the restrictions on these filings are narrow and are limited to those conditions found in Rule PUB 302.05 (b) (1) and (2) which have grown from well established principles of labor law and public policy.[3] Implicit in this distinction is that parties should not be relying on two concurrent, yet

[2]The concept of recognition and certification by the PELRB is an important one. "The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB *and* by any subsequent modifications approved by PELRB." (Emphasis added) Appeal of Londonderry School District, 142 N.H. 677, 680 (1998). "Mere mention of a position in the text of a CBA does not avoid the need to satisfy the statutory requirements for adding that position to the bargaining unit." *Id.*, at page 682. There is a limit as to when and how this may be accomplished, for example, as controlled by Rule PUB 302.05 (b)

[3]Provisions such as those found in rule PUB 302.05 (b) are not unique to New Hampshire. The Massachusetts Labor Relations Commission rule, cited as 456 CMR 14.06 (1) (b), provides that board proceedings may be entertained to examine the inclusion or exclusion of job titles, "provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially

different , methodologies to resolve unit composition issues in competing forums because to do so may be confusing and counter productive to either the negotiations process, for which good faith is required under RSA 273-A:3, or the administrative adjudicatory process. Thus, this background is the genesis of the exclusionary provisions of PUB 302.05 (b).

Public policy considerations, as well as the efficiency of government, favor the ability of the parties to resolve interim and evolving issues involving unit composition. When resolution is attempted or accomplished in the context of negotiations, the parties are presumed to be negotiating from equally informed positions, on a level playing field and with no unfair advantages. As such, when unit composition issues become part of contract negotiations, they become part of the ebb and flow of the negotiations process, to be bartered and traded across the table, within the confines allowed by 273-A:8. Thus, when a party "trades off," prevails on or withdraws its unit composition bargaining issue, there is an assumption that that action, what ever it may have been, was part of a larger bargaining picture.

In this case, we have no alternative but to conclude there was bargaining about unit composition issues. This conclusion is affirmed by the chronology found in Finding No. 3, where the "nurse" proposal was expanded to cover three job titles, where the uncontested testimony, from Finding No. 4, was that these issues remained "almost to the very end," and that unit composition issues had been part of mediation and would have been included in the fact finding process had a financial package not resolved all bargaining issues in the meantime.[4]

We are cognizant of the purposes of PUB 302.05 (b) (2) to the extent that they are intended to encourage voluntary settlement of unit issues and to discourage pursuing these issues in multiple forums. This is akin to the adage in grievance arbitration that a party should not achieve at arbitration that which it has bargained away at the table.[5] The Association's

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changed *since the effective date of the collective bargaining agreement* may be entertained." (Emphasis added.) Thus, in order to be timely, the change must have occurred after negotiations for a successor agreement and, given the conditions, could not have been known prior to or during the negotiations for that agreement. Maine is even more specific in its limitation on what are known as "unit clarification petitions." Maine Labor Relations Board, Rules and Procedures, Ch. 11, § 6, paragraph 3 provides that such petitions "may be denied if...the petition requests the clarification of unit placement questions *which could have been but were not raised prior to the conclusion of negotiations* which resulted in an agreement containing a bargaining unit description." (Emphasis added.)

[4]This decision is not intended to discourage the voluntary resolution of unit composition issues. It is, however, intended to distinguish between those instances where the parties fail to reach a rapid resolution of unit issues and, preserve, or attempt to preserve, a right to have the matter examined by the PELRB, through a unit modification proceeding. When the parties, or either of them, have negotiated unit composition issues as part of the mediation and fact finding processes, they have essentially taken a non-mandatory, or "permissive" subject of bargaining to the impasse procedures of RSA 273-A:12. When this occurs, we find that the PUB 302.05 (b) bar dues apply. On the other hand, parties should not be discouraged from settling unit composition issues by conference, by specially agreed-to bargaining mid-term to the CBA, or, as was the case here, during the course of negotiations for a successor agreement. When this process is done in a consultative or previously agreed-to manner and unless there has been a specific agreement to the contrary, has not involved mediation or fact finding, the moving party must be permitted to withdraw the proposed concerning unit composition in favor of unit modification proceedings conducted by the PELRB. Conversely, if the bargaining over unit composition issues has occurred during the process of negotiating a successor CBA and if it has involved the use of mediation or fact finding over those same issues as invoked by one of the parties only, then that party has essentially waived its right for a "second bit at the apple" in the form of PELRB proceedings and the restrictions of PUB 302.05 (b) will be applicable.

[5]See City of Keene v. Keene Police Officeres, SEA, Local 1984, PELRB Decision No. 1998-048 (May 29, 1998), p. 6.

capitulation on the inclusion of the three new job titles in order to achieve an expedited financial settlement was bargaining, and a *quid pro quo* under Strafford County, below. The Association did take its proposal "off the table." Its unilateral protestations of intending to proceed to the PELRB cannot save that proposal from the application of PUB 302.05 (b) (2).

The PELRB has affirmed the policy that "double dipping" in multiple forums is to be avoided. See SEA/Strafford County Correctional Employees v. Strafford County Commissioners, Decision No. 2001-063 (July 6, 2001) page 5, to wit:

> It is common for parties to discuss the inclusion or exclusion of job titles in a bargaining unit. Likewise, this practice is recognized in PUB 302.5 (b) which speaks to those times when there is an attempt to "modify the composition of a bargaining unit negotiated by the parties and the circumstances...actually changed prior to negotiations on the collective bargaining agreement presently in force." (Emphasis added.) In essence, this is a bar to "double-dipping" on modification issues if they have been raised in negotiations and bargained away as *quid pro quo* for another benefit or language. Thus, the administrative rules contemplate that modification issues be negotiated, although there is no requirement to reach agreement either under the rules or the statute, i.e., RSA 273-A:3. The County was wrong in refusing to negotiate or discuss the matter although it was under no obligation to agree or to make a concession. It must cease and desist from such refusals to negotiate; however, it may now be more expeditious, after the fact, for the Union merely to file a modification petition if it continues in its belief that corporals have a community of interest under RSA 273-A:8 and PUB 302.02 with existing job titles contained in the bargaining unit.

The Association raised a final reason why the PUB 302.05 bar should not apply, namely, because the change in circumstances actually occurred during, and not prior to, the collective bargaining agreement (1998-2001) presently in force. A denial is required if the change in circumstances occurs prior to negotiations on the CBA presently in force, the concept being that the parties had the opportunity to address the unit issue in bargaining and did not, thus ratifying the *status quo* of the contested position(s) when they signed the successor agreement. We reject the Association's argument because it makes a mockery of "double dipping" which is to be avoided under *Strafford County, supra,* and because the Association was negotiating for what was to become a 2001-2004 CBA. To simplify what could become unnecessarily confusing, the Association could have pursued a modification petition for their *1998-2001* CBA without the provisions of PUB 302.05 (b) applying. Since they were negotiating to effect change for the 2001-2004 agreement, the changes had already occurred and the PUB 302.05 (b) (2) bar is applicable.

In accordance with the above and by way of disposing of the pending petition, we GRANT the District's Motion to DISMISS that petition but do so without prejudice to the Title 1 Teacher/Coordinator, however that may be resolved, consistent with the rationale noted in Footnote 1 on page 2, above, and without prejudice to what has been described as the Guidance Counselor/Assistant Principal because the job description for that position was last changed or updated "5/1/01," after the current settlement was reached and after the instant modification petition was filed. It thus qualifies as a new "change in circumstances" within the meaning of PUB 302.05 (b), having happened after the conclusion of the 2001-2004 negotiations. The certified bargaining agent may file a new modification petition for adjudication of the Title 1 and

Guidance Counselor/Assistant Principal positions at its convenience. It must, however, await a new "change in circumstance" before it can file such a petition for the nurse or social worker positions.

So ordered.

Signed this 15th day of October, 2001.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.